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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the dismissal of a civil action on the pleadings, based on nothing more than the intervenor Government's bare assertion of the state secrets privilege, violated the petitioners' constitutional rights of access to the courts.

PARTIES TO THE PROCEEDINGS

The petitioners are the legal representatives of sailors killed and injured on board the U.S.S. STARK on May 17, 1987. Their names are as follows:

Lawrence M. Bareford (injured)
Mr. and Mrs. Roland Bolduc (Doran H. Bolduc, deceased)
Mr. and Mrs. Leonard Calkins (Jeffrey L. Calkins, deceased)
Mr. and Mrs. Robert A. Caouette (Mark Robert Caouette, deceased)
Mrs. Kathleen Ciletta (John A. Ciletta, Jr., deceased)
Mr. and Mrs. Robert DeAngelis (Christopher DeAngelis, deceased)
Mr. and Mrs. Rodney Erwin (Steven Thomas Erwin, deceased)
Mrs. Shirley Jean Farr
Kasandra Ann Farr, a minor
Mr. and Mrs. Wilson P. Farr (Jerry Boyd Farr, deceased)
Mrs. Ernestine Foster
Tyrone Foster, a minor
Vernon Foster, a minor
Leo Foster, Sr.
Mim Foster Gaines (Vernon Foster, deceased)
Karen Gangidine (Martin Supple, deceased)
Mr. and Mrs. Nathan Grissette, Jr. (Dexter D. Grissette, deceased)
Mrs. Frances Homicki
Laura T. Homicki (Daniel Homicki, deceased)
Mr. and Mrs. Kenneth D. Janusik (Kenneth D. Janusik, deceased)
Mrs. Diane P. MacMullen
Deborah A. MacMullen, a minor

Lauren E. MacMullen, a minor (Thomas J. MacMullen, deceased)
Mr. and Mrs. Walter S. Phelps, III (Jeffrey Lee Phelps, deceased)
Mrs. Diana Lynn Pierce
Randi Lynn Pierce, a minor
Logan Mitchell Pierce, a minor
Mr. Donald W. Pierce (Randy E. Pierce, deceased)
Robert Quick
Karen Jean Welch (Kelly R. Quick, deceased)
Mrs. Carol A. Shippee
Patricia C. Shippee, a minor
Timothy M. Shippee, a minor
Brian R. Shippee, a minor (Robert L. Shippee, deceased)
Mr. and Mrs. Roger Stephens (Lee Stephens, deceased)
Mr. and Mrs. Bobby G. Stevens (James R. Stevens, deceased)
Mr. and Mrs. Alfred Ulmer (Vincent L. Ulmer, deceased)
Mrs. Lori E. Weaver
Patty J. Strong (Wayne R. Weaver, II, deceased)
James R. Wheeler (injured)
Mr. Joseph E. Wilson
Mrs. Mamie E. Wilson (Lloyd A. Wilson, deceased)

The respondents are private corporations:

General Dynamics Corporation
Hughes Aircraft Company
Unisys Corporation
General Electric Co. d/b/a RCA Corporation
RCA Government Systems Division
General Electric Aerospace
Advanced Technologies, Inc.

Rockwell International Corporation
FMC Corporation
Cardion Electronics, Inc.
Raytheon Company

At trial, the United States Government, through the Department of Justice, intervened in this case and is also a respondent in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Lawrence M. Bareford, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App., *infra*, 3a-15a) and the court's opinion on rehearing (App., *infra*, 1a-2a) are reported at 973 F.2d 1138 (5th Cir. 1992). The opinion of the United States District Court for the Southern District of Texas, Galveston Division, (App., *infra*, 16a-34a) and that court's final judgment (App., *infra*, 35a) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 16, 1992. A petition for rehearing was denied on October 14, 1992.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional right of access to the courts has been found in the right to petition clause, U.S. Const., amend. I, in the privileges and immunities clause, U.S. Const., art. IV, § 2, in the due process clause, U.S. Const., amend. V, and in the judicial power/diversity clause, U.S. Const., art. III, § 2.

The constitutional basis for the federal common law state secrets privilege has been found in the constitutional system of separation of powers and in the President's Article II duties as Commander in Chief and responsibilities for foreign affairs, U.S. Const., art. II, § 2.

The pertinent text of these constitutional provisions is reproduced in the Appendix at App., *infra*, 36a. No federal statutes are involved.[2]

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[1] The Fifth Circuit, on rehearing, separately remanded a gag order that had been imposed on the proceedings by the district court. That gag order has since been lifted.

[2] Specifically, this case does not involve classified information sought under the Freedom of Information Act,("FOIA") 5 U.S.C. § 552(b)(1), and, since it is not a criminal case, it does not involve the Classified Information Procedures Act, ("CIPA"), 18 U.S.C. App. §§ 1-16.

STATEMENT

This case presents the extreme example of the abdication of judicial control "to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). This dispute began as a wrongful death action by the families of deceased sailors (the "sailors") against the private defense contractors (the "contractors") whose defective equipment and calculated fraud caused the sailors' deaths. While the case was still on pleadings, and at a time before any discovery had been conducted, the Government, a nonparty, intervened and alleged that petitioners should not be allowed to proceed with this litigation. The Government sought dismissal of the sailors' suit based solely upon a conclusory affidavit by the Secretary of the Navy that this suit "would be expected to cause measurable damage to the national security of the United States." (R. 74).

Despite the over 2,500 pages of nonprivileged documents which the sailors filed in response to the Secretary's affidavit, the district court dismissed the sailors' lawsuit against the private contractors and refused to entertain any options short of outright dismissal. The Fifth Circuit held that the Secretary's affidavit alone, without further scrutiny, formed sufficient basis for dismissal of the sailors' civil action.

1. The Lawsuit.

On May 17, 1987, 37 sailors were killed and a host of others were injured when the U.S.S. STARK was hit by two Iraqi Exocet missiles. On April 26, 1990, the sailors filed suit against General Dynamics Corporation and a number of defense contractors, and alleged that the contractors' negligence, breach of warranty, product defects, fraud, misrepresentation, and deceptive trade practices led to the sailors' deaths and injuries.

2. The Government's Motion to Dismiss.

Shortly thereafter, and before any discovery had been sought, the Government intervened and moved to dismiss based on claims of the state secrets privilege.[3] The Government based its motion to dismiss entirely on the affidavit of then-Secretary of the Navy, Lawrence Garrett.[4] In that affidavit, Secretary Garrett stated that he had reviewed *with Government attorneys* "the types of information the plaintiffs would require in order to establish legally sufficient claims" and that *he* had determined that the disclosure of that information would "cause damage to the national security of the United States . . . ." Secretary Garrett then reviewed in broad terms, without reference to any specific documents, the "types of information" which are classified. Secretary Garrett then asserted the formal privilege over any information "which would indicate, *directly or indirectly*, the classified technical information concerning the weapons systems at issue" (emphasis added).

At the time the Government filed its motion to dismiss, and at all times thereafter, the sailors had not sued the United States and had not sought discovery of any classified information, either from the United States or from any party.

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[3] The Government also asserted a right to dismiss based upon the "espousal doctrine" and the political question doctrine. The district court rejected the espousal doctrine and the Government did not challenge that decision on appeal. The Fifth Circuit based its judgment entirely on the state secrets claim and expressly chose not to address the political question issue. App., *infra*, 14a.

[4] Secretary Garrett's affidavit is referenced in the Fifth Circuit opinion, App., *infra*, 7a-8a, and published as an appendix to the opinion of *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 548-53 (2d Cir. 1991).

3. The Sailors' Response.

As the sailors' response to the motion to dismiss made clear, the sailors intended to prove their case *without the use* of classified information. In response, the sailors presented over 2,500 pages of information, all of which is in the public domain. The Secretary never reviewed any of this information nor asserted a privilege over this information. App., *infra*, 7a. Also importantly, neither the Government nor the contractors controverted any of this information.

The sailors' nonprivileged production revealed that General Dynamics had fraudulently misrepresented the reliability of the Phalanx antimissile system, and that had the system worked as represented, the sailors would not have been killed. These facts were proved through detailed and uncontroverted affidavits and exhibits of two former General Dynamics' employees. Those affidavits swore that, with knowledge of the certain harm to our servicemen, General Dynamics created an "outlaw" software program which circumvented the Navy's reliability testing, and that General Dynamics, contrary to its representations to the Navy and others, knowingly manufactured a system that could not function.[5]

Also included in the sailors' documents was the affidavit of Captain Brindel, who was the commander of the U.S.S. STARK at the time of the incident. In that detailed and uncontroverted affidavit, Captain Brindel discussed the public record information concerning the rules of engagement and the details of the attack. Captain Brindel also discussed the capabilities of the defensive weapon systems. Captain Brindel swore: "I believe that STARK could have safely defended itself, and avoided the tragedy that occurred that

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[5] The Government has admitted, in contrast to the broad conclusions in the Secretary's affidavit, that these affidavits "do not contain classified information." (R.E. 43).

night, if the shipboard systems had performed to their represented capabilities."

The sailors also filed the affidavit of James H. Webb, Jr., who was the Secretary of the Navy at the time of the STARK incident. Mr. Webb acknowledged the public information about the system-wide problems with the Phalanx system, and the Navy's handling of the incident. Mr. Webb then stated: "Given the nature of the allegations in this case — that misrepresentation, failure to warn, and acts of fraud were committed as a matter of course by defense contractors — I believe it would benefit the national security of the United States to allow the case to go forward *under proper security restraints*" (emphasis added).

The sailors also filed documents which included the redacted Navy report of the incident, the lengthy, published congressional reports of the incident, congressional correspondence, and media reports about the incident and defects in the contractors' equipment.

4. The Dismissal.

Despite this wealth of nonprivileged evidence which proved the sailors' *prima facie* case without classified information, and despite the fact that the sailors had *never sought* classified information, the district court, without further scrutiny,[6] dismissed the sailors' lawsuit. The district court also refused to exercise any other judicial control, short

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[6] On the day before the hearing on the motion to dismiss, long after the deadline for responses had passed and without prior notice, the Government engaged in an *ex parte* conference with the district court, of which no record was made. The Fifth Circuit considered the due process violations in this *ex parte* proceeding "harmless" and whatever information may have been communicated by the Government to the district court formed no part of the Fifth Circuit's opinion. App., *infra*, 14a-15a.

of dismissal, in order to police disclosure of classified information. App., *infra*, 29a-30a.

5. The Fifth Circuit Opinion.

The Fifth Circuit affirmed the district court's dismissal based solely upon Secretary Garrett's affidavit, without further judicial scrutiny. With only that affidavit as a guide, the Fifth Circuit concluded: (1) that the sailors "have failed to demonstrate that [evidence that 'the Phalanx system was intended to destroy the Iraqi missile in these circumstances'] is available to them as unclassified information," App., *infra*, 9a; (2) that even if the sailors had made out a *prima facie* case, dismissal was yet required "because any further attempt by the plaintiffs to establish a *prima facie* case would threaten the disclosure of state secrets," App., *infra*, 10a; and (3) that "[n]o intermediate solution such as proposed by plaintiffs [short of dismissal] . . . can fully protect the United States' interest in keeping its state secrets undisclosed." App., *infra*, 14a. Thus, based upon the Secretary of the Navy's affidavit alone, in this case between private litigants, the Fifth Circuit denied the deceased sailors' families a right to their day in court.

REASONS FOR GRANTING THE PETITION

This case presents this Court with a significant opportunity to resolve a recurring issue of great national importance; that is, the constitutional and procedural boundaries which govern the assertion of the federal common law state secrets privilege by the executive. This Court has

not directly confronted this issue since its landmark decision in *United States v. Reynolds*, 345 U.S. 1 (1953).[7]

During these four decades of percolation, the handling of the state secrets privilege by federal courts in civil litigation has been chaotic, conflicting, and at times, as one jurist has said, "potentially frightening." *See Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 283 (4th Cir. 1980) (en banc) (per curiam) (Murnaghan, J., dissenting). As is shown by the collection of cases listed in the Appendix, federal courts have widely experimented in their attempts to satisfactorily resolve the competing constitutional interests. *See* App., *infra*, 37a-42a. Such experimentation has ranged from allowing litigation to proceed without privileged information (as was approved in *Reynolds*), to abatement of the suit until the national security threat no longer exists, to *in camera* trials, to appointment of a special master, to denial of a jury trial, to depositions before the judge in a secure facility, to item-by-item assertion of the privilege over specific documents, to provision of court reporters with security clearances — and, finally, as here, to the complete abandonment of judicial control by outright dismissal of the cause of action. *See* App., *infra*, 37a-42a.

Disturbingly, the assertion of the state secrets privilege by the Government, as reflected in reported cases, has become increasingly more common in recent years, particularly in suits between private parties.[8] And, equally

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[7] Although the state secrets privilege was mentioned in dicta in *United States v. Nixon*, the Court there was concerned with the parameters of the so-called executive privilege for presidential communications, the state secrets privilege not having been invoked. 418 U.S. 683, 710 (1974).

[8] The Appendix includes reported cases in which the Government invoked the federal common law state secrets privilege, and does not include cases which were decided under the classified information exception of the FOIA, criminal cases under CIPA, or CIA regulation cases. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990). Of

disturbing, the remedy of choice in such suits, particularly in suits between private parties, has become abandonment of judicial control by outright dismissal.[9] It is time for this Court to reconcile the conflicts in opinions among courts of appeals and district courts and to establish workable standards to guide federal courts in the future.

Moreover, a compelling need exists for this Court to resolve the constitutional issues left open in *Reynolds*. In *Reynolds*, the widows of three civilians, who were killed in the crash of an aircraft which was testing secret electronic equipment, sued the Government under the Federal Tort Claims Act. 345 U.S. at 3. Pursuant to a discovery request under Rule 34 of the Federal Rules of Civil Procedure, the widows sought production from the Government of the official accident investigation report. *Id.* The Government declined to produce the report, even after ordered to do so, and invoked the state secrets privilege. After the court imposed, as a discovery sanction, a finding of liability and entered judgment on damages, an appeal followed. *Id.* at 3-5.

On appeal, the Government asserted that it was entitled to withhold from judicial view any document that *it* deems to be in the public interest. *Id.* at 6. The respondents, on the other hand, asserted that the executive's power to withhold documents was waived by the Tort Claims Act. *Id.* In analysis of these "broad propositions," the Court said: "Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a

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the included cases, over half were reported in the last ten years, with the majority of suits between private parties (including this case) reported during the last two years. *See* App., *infra*, 37a-42a.

[9] In the last year, three reported cases between private parties (including this case) were entirely dismissed on the basis of the assertion by the Government, a nonparty, of the state secrets privilege. *See* App., *infra*, 41a-42a.

narrower ground for decision." *Id.* That "narrower ground" for decision was whether the Government had invoked a valid claim of privilege under Rule 34 of the Federal Rules of Civil Procedure. *Id.*

In the present case, in contrast, the "constitutional overtones" recognized but not addressed in *Reynolds* are unavoidable.[10] Here, unlike *Reynolds*, the sailors *never* sued the Government. And the sailors *never* sought production of any classified information from the Government. Thus, the validity of the claim of privilege under Rule 34 is not at issue.

Rather, what is directly at issue in this case is the stark collision between the constitutional need of the Government to protect state secrets and the constitutional right of the petitioners of access to the courts. In order to prevent constitutional abuses in the name of national security, this Court should finally resolve this issue and provide clear standards to guide the Executive Branch, courts, and litigants.

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[10] These constitutional issues were raised in the trial court in petitioners' response to the motion to dismiss (R. 116), at the hearing on the motion to dismiss (R.E. 56, 62), in the petitioners' motion for reconsideration, for new trial, or to alter or amend findings (R. 129), and in the petitioners' motion to reinstate (R. 152). The pertinent point of error brought in the court of appeals was: "Whether the district court's national security dismissal violated Appellants' constitutional rights to access to the courts, since Appellants had presented a *prima facie* case of negligence, breach of warranty, strict liability, fraud, misrepresentation, and deceptive trade practices." *See* Brief of Appellants.

1. Judicial Control Over the Evidence Cannot Be Abdicated to Executive Officers.

The sailors, both here and below, are fully mindful of the need to protect national security.[11] But our courts must be ever mindful of abuses committed in the name of national security. In fact, many of the most shameful episodes in our history were founded upon assertions of "national security." Stacy, *Espionage Prosecutions, the Right to Present a Defense, and the State Secrets Privilege*, 58 Univ. Colo. L. Rev. 177, 210 n.138 (1977). Such episodes include the Red Scare of the 1920s, the mass incarceration of Japanese-Americans during the 1940s, the McCarthyism of the 1950s, and the politically motivated break-ins and wiretaps of the 1970s. *Id.* As Justice Robert H. Jackson once wrote, "[s]ecurity is like liberty in that many are the crimes committed in its name." *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

This case vividly demonstrates how easily the rights of citizens can be abused by Government assertions of national security in the state secrets context. Here, the sailors filed their lawsuit against private defense contractors. The Government had not been called to the controversy and no party had yet sought any information, classified or otherwise, from the Government. Nonetheless, the Government intervened and sought to dismiss the case.

The Government relied for dismissal solely upon the bare assertion by the then-Secretary of the Navy of categories of classified information (no specific documents were ever mentioned) and the belief that the sailors' lawsuit would threaten disclosure of classified information and impair national security. *See Zuckerbraun v. General Dynamics*

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[11] The petitioners' lead counsel in the district court was Michael J. Maloney, who is a 20-year Naval Reserve Commander with three tours of duty in Vietnam. (R.E. 56).

Corp., 935 F.2d 544, 548-53 (2d Cir. 1991) (reproduction of Secretary Garrett's affidavit). This belief was arrived at *before* the facts upon which the sailors based their claims were known and *before* any discovery had been instituted. And, this belief was arrived at after a perhaps self-serving review with Government attorneys of the "types of information" the sailors would need to prove their case.

The Secretary of the Navy is not a judicial officer of the United States. The Secretary does not have the power under the Constitution to determine what the law is, or should be, in this case. *See Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Moreover, the Secretary presented no evidence to support his broad assertions and determinations. Rather, his claim was founded entirely upon his own classification and analysis.

Yet, the courts below accepted these bare assertions uncritically. The courts did not probe to test the merits of these assertions. The courts did not exercise any further judicial scrutiny over the Secretary's affidavit. Even in the face of the sailors' voluminous, detailed, and documented evidence — nonprivileged evidence which the Secretary had never seen or reviewed — the courts below required nothing further from the Government. The courts dismissed the sailors' lawsuit on the pleadings before any discovery had been conducted.

This uncritical acceptance of a conclusory affidavit by an executive officer as the sole basis for dismissal, without more, represents a relinquishment of the judicial province. If the precedent of this and other recent state secrets cases is allowed to go unchecked, the stage is set for widespread abuse. Here, the privilege was invoked to cover up the fraud of defense contractors. Tomorrow, the privilege may be invoked to cover up the wrongdoing of the executive itself.

Professor Wigmore, in his discussion of this subject, cautioned:

> A court which abdicates its inherent function of determining the facts upon which the admissibility depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege.

John H. Wigmore, 8 *Evidence in Trials at Common Law* § 2379, at 809-10 (1961).

Others have noted the problems of executive officers whose "official habit and leaning tend to sway him toward a minimizing of the interest of an individual," of executive officers whose administrative practices preclude actual personal consideration of evidence, and of the "persistent tendency" of executive officers to overclassify. *McCormick's Handbook of the Law of Evidence* 235 (E. Cleary ed. 1972); *U.S. Government Information Policies and Practices — The Pentagon Papers: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong. 1st Sess., pt. 3, at 791 (1971) (testimony of then-Assistant Attorney General William Rehnquist).

The executive cannot be allowed to determine, without further judicial scrutiny, whether or how a civil action between private litigants should proceed. The courts should not be permitted to share their judicial function with the executive. *See United States v. Nixon*, 418 U.S. 683, 704 (1974) ("The 'judicial power of the United States' . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power . . . .").

These very principles fueled the decision in *Reynolds*. There, the Court wrestled with the problem of how to

harmonize the two extremes between uncritical acceptance of the affidavit of an executive officer, as here, and "forcing a disclosure of the very thing the privilege is designed to protect." 345 U.S. at 8. The Court resolved this "real difficulty" by establishment of a "formula of compromise" through analogy to the privilege against self-incrimination. *Id.* at 8-9.

With the privilege of self-incrimination, the Court had also been forced to harmonize two extremes: "[t]oo much judicial scrutiny into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Id.* at 8. The latter extreme was represented by those who advocated, as here, "that the bare assertion by the witness must be taken as conclusive . . . ." *Id.*

The compromise struck with the privilege of self-incrimination requires a court to exercise independent judicial scrutiny of the evidence and circumstances, the question asked, and whether injurious disclosure might result. *Id.* at 9. The *Reynolds* court held that "some like formula of compromise" must be applied with the state secrets privilege. *Id.* at 9. As the Court held: "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10.

In view of the "dubious necessity" for the privileged documents in *Reynolds*, since the petitioners could prove their case with alternative discovery sources, the Court held that the affidavit of the Secretary of the Air Force was a "sufficient showing" to cut off further discovery. *Id.* at 11. The Court remanded the case for trial without the privileged information. *Id.* However, the Court said that in cases where there is a strong showing of necessity, "the claim of privilege should not be lightly accepted . . . ." *Id.*

As with most seminal cases, the principles espoused in *Reynolds* established the landscape and the terrain, but the

cultivation was left to the lower courts. Unfortunately, as is evident from the conflicting decisions in this area, the lower courts have not benefitted from the lack of supervision and the lack of concrete standards and procedures. Now, almost 40 years later, we have reached the nadir in the development of the law.

It is time for this Court to establish meaningful procedures to guide the lower courts in the application of the state secrets privilege. Such procedures have been established by Congress in criminal cases in the Classified Information Procedures Act, 18 U.S.C. App. §§ 1-16. However, no such uniformity has been achieved in the development of the federal common law state secrets evidentiary privilege in civil cases.

The lack of standards can be seen here. For example, a number of other courts of appeal have held that the effect of the state secrets privilege, as with other privileges, is to remove that evidence from the case, "as though a witness had died." *See, e.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (*see* other sources noted at 709 F.2d at 64 n.56). With the evidence thus removed, dismissal is required "only if the plaintiffs were *manifestly* unable to make out a *prima facie* case without the requested information." *Id.* at 65 (emphasis added).

However, in this case, the Fifth Circuit held that even if the court concluded that the sailors had made out a *prima facie* case, dismissal was still required because the case "threatened" disclosure of state secrets, even peripherally. *See* App., *infra*, 10a-13a. The logic of this holding is troubling, for it is difficult to conceive of any way that a plaintiff could ever prevail. Even if the plaintiff, as here, produced volumes of unprivileged evidence to establish a *prima facie* case, it would still not be enough. The plaintiff's strong *prima facie* case could not overcome unsubstantiated "threats" of the disclosure of privileged

information which the plaintiff (and the court) had never seen, which the plaintiff had never sought, and which the plaintiff did not intend to use.

This lack of uniformity and lack of standards for the application of the state secrets privilege needs to be corrected.

2. Outright Dismissal Violated Petitioners' Constitutional Rights of Access to the Courts.

In 1985, the Fourth Circuit held, in a state secrets dismissal of a suit between private parties, that "denial of a forum provided under the Constitution for the resolution of disputes, U.S. Const., art. III, § 2, is a drastic remedy that has rarely been invoked." *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985).

Indeed, *Fitzgerald* was the *first* case in American jurisprudence where, in a suit between private parties, the action was dismissed based upon the assertion by the Government of the federal common law state secrets evidentiary privilege. *See, e.g., Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) (remanded for trial without privileged information); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977) (affirmed trial to bench and appointment of a special master); *see* App., *infra*, 41a-42a.

However, armed with the precedent established in *Fitzgerald*, the Government has selectively chosen to use the privilege as an offensive weapon. Where in 1985, dismissal was "rarely invoked," the Government now seeks dismissal in every case in which state secrets may be implicated. Because of the uncertain standards that guide these determinations (and surely because of the complexity and delicacy of these cases), dismissals have become routine. Last year alone, in the reported cases, four separate actions (including this case) were dismissed based solely upon the

assertion of the state secrets evidentiary privilege. *See, e.g.*, *Bowles v. United States*, 947 F.2d 91 (4th Cir. 1991); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991); *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991); *see also Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989).

The "constitutional overtones," as *Reynolds* put it, of this problem cannot be overstated. On the one hand, the Government's need to protect state secrets has a constitutional basis. The exact basis is unclear, but this Court has suggested that the privilege is rooted in the separation of powers, *Reynolds*, 345 U.S. at 6 n.9, or derived from the President's Article II duties as Commander in Chief or responsibilities for foreign affairs, *United States v. Nixon*, 418 U.S. 683, 710 (1974). *See Halkin v. Helms*, 598 F.2d 1, 14 (1978) (Bazelton, J., dissenting).

On the other hand, the sailors have a constitutional right of access to the courts. This is a fundamental right derived from various constitutional sources. The right of access to the courts has been found in the petition clause of the First Amendment, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); in the privileges and immunities clause of Article IV, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907); in the due process clause of the Fifth Amendment, *Silver v. Cormier*, 529 F.2d 161, 163 (8th Cir. 1976); and in the "judicial power" clause of Article II, *Fitzgerald*, 776 F.2d at 1242. This Court has recognized the fundamental nature of this right. "The right to sue and defend in the court is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers*, 207 U.S. at 148.

When these constitutional rights conflict, it is the duty of federal courts to reconcile the conflict. The petitioners' constitutional rights of access to the courts should not be rendered nugatory by the bare assertion of an evidentiary

privilege. The Court should devise procedures short of dismissal, which will protect and honor both constitutional interests.

Such procedures have been satisfactorily employed in the past and were available here. In fact, a few years ago this Court recognized a detailed government contractor (or military contractor) defense, promulgated in part to meet separation of powers concerns. *See Boyle v. United Technologies, Inc.*, 487 U.S. 500 (1988). If this case is not reviewed, the delicate balance struck in *Boyle* will be rendered worthless. In every case that involves military equipment, the Government, at its whim, can intervene to dismiss, based upon the unsupported assertion of vague "threats" of disclosure of information inimical to "national security."

In addition to the government contractor defense, the courts below had a number of other options. *See, e.g.*, *Reynolds*, 345 U.S. at 11-12 (remand for trial without privileged information; *In re United States*, 872 F.2d 472 (D.C. Cir. 1989), *cert. dism'd sub nom. United States v. Albertson*, 493 U.S. 960 (1989) (district court can police interests with item-by-item determination and other controls); *Northrop Corp.*, 751 F.2d at 400-02 (remand for trial without privileged information); *Loral Corp.*, 558 F.2d at 1132-33 (affirmed denial of jury trial and appointment of special master); *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (remanded for trial *in camera*); *see also* Comment, *Keeping State Secrets From the Jury: New Options for Safeguarding State Secrets*, 47 Fordham L. Rev. 94, 109-13 (1978) (describing options short of dismissal for the protection of state secrets); Zagel, *The State Secrets Privilege*, 50 Minn. L. Rev. 875, 885-88 (1966) (describing procedures to protect secrets yet allow cases to go forward).

To protect their right to a forum, and to balance their mutual concern to protect national security, the sailors below moved the district court and the Fifth Circuit to apply any

number of these options short of dismissal. (R. 129). In open court, the sailors offered to waive their right to a jury trial, to dismiss all defendants save General Dynamics, to permit only attorneys before the court with proper clearance, and so forth. (R.E. 61). The sailors also sought a long-term abatement until the contractors' equipment became obsolete or the national security threat vanished. (R. 129). Both the district court, App., *infra*, 29a-30a, and the Fifth Circuit, App., *infra*, 14a, rejected *any* procedural options and abandoned judicial control by outright dismissal.

This refusal to apply, or even attempt, *any* options, even when the sailors had yet to request a single privileged document to prove their case against a private party, shows the essentially standardless treatment to which the petitioners' fundamental constitutional rights have been accorded. This result is "not in keeping with the basic constitutional tenets of this country" and "would undermine our country's historic commitment to the rule of law." *Spock v. United States*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) (court rejects Government's attempt to foreclose, at the pleading stage, with the state secrets privilege, Dr. Spock's suit for illegal wiretap).

In sum, this issue has been allowed to percolate too long in the lower courts. This case represents an extraordinary example of the modern abuses of the state secrets evidentiary privilege and therefore provides an excellent vehicle by which the Court can check these abuses and restore a constitutional balance.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 91-2432

LAWRENCE M. BAREFORD,
Individually, et al.,
Plaintiffs-Appellants,

versus

GENERAL DYNAMICS CORPORATION, ET AL.,
Defendants-Appellees,
and

UNITED STATES OF AMERICA,
Intervenor-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

On Petition for Rehearing and Suggestion
for Rehearing En Banc

Filed October 14, 1992
(Opinion September 16, 1992, 5th Cir.
1992, --- F.2d ---)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

We vacate part V of our opinion in *Bareford v. General Dynamics Corp.*, --- F.2d --- (5th Cir. 1992), and substitute the following therefor:

Plaintiffs challenge on First Amendment grounds the district court order to the parties not to communicate any information about the litigation to anyone except essential legal staff. We are persuaded that the maintenance of this order is a matter that must be remanded to the district court to examine in the first instance in light of this Court's rulings.

In all other respects, the order of the district court, dismissing plaintiffs' claims, is AFFIRMED.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

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*Senior District Judge of the Western District of Louisiana, sitting by designation.

LAWRENCE M. BAREFORD, Individually, et al., Plaintiffs-Appellants,

v.

GENERAL DYNAMICS CORPORATION, et al., Defendants-Appellees, and United States of America, Intervenor-Appellee.

No. 91-2432

United States Court of Appeals,
Fifth Circuit.

Sept. 16, 1992.

Before HIGGINBOTHAM and DUHÉ, Circuit Judges and HUNTER.* District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge.

We must grapple with the federal government's invocation of the state secret doctrine to a manufacturing and design defect suit against the manufacturer of a military weapons system. We are persuaded that plaintiffs would be unable to prove their case without classified information and that the very subject matter of the trial is a state secret. We affirm the district court's dismissal.

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*Senior District Judge of the Western District of Louisiana, sitting by designation.

I.

In 1987, during the Iraqi-Iranian War, an Iraqi F-1 Mirage fighter fired two Exocet missiles at the U.S.S. Stark, an Oliver Hazard Perry class frigate stationed in the Persian Gulf. The attack killed 37 crewmen on the Stark, including 23 of the plaintiffs' decedents in this case.

The Navy's official investigation concluded that there were four principle causes of the missiles' successful penetration of the Stark's defenses: (1) the failure of the Stark's commander to recognize the threat posed by the F-1 Mirage fighter; (2) improper watch manning and standing; (3) lack of proper weapon readiness; and (4) failure of the Stark's commander to use radar to warn the fighter to desist its attack. The United States has espoused the sailors' and their families' claims for death and has received over $27 million from Iraq to compensate families for deaths of sailors which has been distributed to the families of the deceased crewmen.

Bareford and other plaintiffs filed this action against several defense contractors including General Dynamics asserting that the Phalanx weapons system was defectively manufactured and designed, that General Dynamics and other contractors fraudulently and deceptively concealed these defects, and that the sailors' deaths or injuries were proximately caused by these defects.

The government intervened and filed a 12(b)(6) motion to dismiss the complaint, on the grounds that (1) the plaintiffs' claims had been espoused by the U.S. government; (2) the case presented a non-justiciable political question; and (3) the subject of the lawsuit was a "state secret" that was privileged under the state secret doctrine. The contractors filed a similar motion.

In response to these motions, the plaintiffs filed voluminous pleadings and exhibits, including 2,500 pages of affidavits and other documents. A hearing was scheduled on February 14, 1991. One day before the hearing, the government informed the plaintiffs' counsel that it intended to make an *in camera* production before the district court judge. The documents included an affidavit by an admiral and the unabridged version of the Navy Department's official investigation of the Stark incident.

The district court granted the government's motion to dismiss. The district court found that the plaintiffs' action was barred under the state secret privilege, because the trial of the case would require disclosure of classified information sensitive to national security.

II.

The privilege for state secrets allows the government to withhold information from discovery when disclosure would be inimical to national security. *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528,97 L.Ed. 727 (1953). The privilege may be invoked by the head of a governmental department with responsibility over the matter in question, and the head of the department must give personal consideration to the matter in question. *United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S.Ct. 528, 531-32, 97 L.Ed. 727 (1953). A government department may intervene in litigation to which it is not a party and assert the privilege, thereby preventing either party in the litigation from obtaining sensitive government information in discovery.

The effect of the privilege is generally to exclude the privileged evidence from the case. *Ellsberg v. Mitchell*, 709

F.2d 51, 65 (D.C.Cir.1983),*cert. denied*,465 U.S. 1038, 104 S.Ct. 1316, 79 L.Ed.2d 712 (1984). The plaintiff's case then goes forward without the privileged information and would be dismissed only if the remaining information were insufficient to make out a prima facie case. *Halkin v. Helms*, 690 F.2d 977, 998-99 (D.C.Cir.1982). Some courts, however, have held that the privilege can lead to the dismissal of the plaintiffs' case in two other circumstances. First, if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant. *In re United States*, 872 F.2d 472, 476 (D.C.Cir.), *cert. denied sub nom. United States v. Albertson*, 493 U.S. 960, 110 S.Ct. 398, 107 L.Ed.2d 365 (1989); *Molerio v. Federal Bureau of Investigation*,749 F.2d 815, 825 (D.C.Cir.1984). Second, some courts have held that the court should dismiss if the "very subject matter of the plaintiff's action is a state secret," even if the plaintiff has produced non-privileged evidence sufficient to make out a prima facie case. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 274 (4th Cir.1980)(en banc). The reason for dismissal in these circumstances is that witnesses with knowledge of secret information may divulge that information during trial because the plaintiffs "would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing." *Farnsworth Cannon*, 635 F.2d at 281; *cf. Bowles v. United States*, 950 F.2d 154, 156 (4th Cir.1991) ("If the case cannot be tried without compromising sensitive foreign policy secrets, the case must be dismissed.").

A.

We turn first to the plaintiffs' ability to prove their case without revealing state secrets. Although originally styled as a motion to dismiss for failure to state a claim, we will treat the defendants' motion as a motion for summary judgment because both parties have produced and rely upon evidence outside the pleadings. Plaintiffs contend that they can survive summary judgment pointing to 2,500 pages of affidavits and documents, all assertedly in the public domain. These documents include an affidavit of the former captain of the U.S.S. Stark, two affidavits from former employees of General Dynamics, and information contained in Congressional reports and other published sources. The Secretary of the Navy asserts no privilege for this evidence.[1]

There is a preliminary question of whether the government has validly invoked the state secret doctrine. Bareford asserts that Secretary of the Navy H. Lawrence Garrett did not personally review the plaintiffs' documents as required by *Reynolds*, 345 U.S. at 7-8, 73 S.Ct. at 531-32. We disagree. The government does not target documents produced by the plaintiffs, but objects to the claim which by necessity would rely upon highly sensitive information. Secretary Garrett states in his affidavit that he personally considered the type of evidence necessary to this claim.[2] The Secretary's review was sufficient.

Plaintiffs have succeeded in producing considerable

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1. The government maintains that security considerations prevent the Navy Department from either confirming or denying whether the offered evidence is classified information.

2. A copy of Secretary Garrett's affidavit was published as an appendix to the opinion in *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 548-53 (2d Cir.1991).

evidence, and present a closer issue than *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir.1991). In *Zuckerbraun*, the claims were almost identical to the claims in this case to recover for the death of a sailor in the Stark incident. The defendants responded with an affidavit from the Navy Secretary identical to the affidavit in this case, stating that the design and operation of the Phalanx weapons system were highly classified and sensitive matters and that disclosure of such information in litigation would be "inimical to national security."

The Second Circuit affirmed the dismissal of Zuckerbraun's claim. Judge Winter, writing for the panel, noted that the plaintiffs' claims of manufacturing and design defects at a minimum required proof of what the Phalanx weapons system is supposed to do, whether it was used when the Stark was hit, and, if it was, whether the failure of the system to work was the result of the manufacturers' negligence. The panel noted that "[t]hese questions cannot be resolved or even put into dispute without access to data regarding the design, manufacture, performance, functional characteristics, and testing of these systems and the rules of engagement under which the Stark was operating." *Zuckerbraun*, 935 F.2d at 547. Because this data was subject to the privilege, the panel concluded that "there is no evidence available to the appellant to establish a prima facie case." *Zuckerbraun*, 935 F.2d at 548.

Plaintiffs distinguish *Zuckerbraun* on the basis that Zuckerbraun apparently did not offer any non-privileged information on which to build a case. As noted in *Zuckerbraun*, "appellant has not designated any sources of reliable evidence on the factual issues going to liability." *Zuckerbraun*, 935 F.2d at 548. By contrast, the plaintiffs point to their 2,500 pages of evidence - eleven Congressional reports, letters, media articles, and eight declarations - that

they contend establishes a prima facie case of liability.

Bareford has come forward with substantial evidence from which a judge or jury might find problems, or even wrongdoing, by General Dynamics in its production and testing of the Phalanx system. That alone will not establish a prima facie case. Its claim of manufacturing and design defects requires proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals. This question cannot be resolved without access to detailed data regarding "the design, manufacture, performance, functional characteristics, and testing of these systems." *Zuckerbraun*, 935 F.2d at 547. Such an analysis of the capabilities of an advanced Navy frigate's defensive systems is the type of judicial disclosure of state secrets the doctrine blocks.

Bareford has come forward with evidence of the intended operation of the Phalanx system, but it is fairly described as evidence of the system's general performance limits, not the necessary detailed analysis of the system's intended performance in the situation in which the Stark incident occurred. This is certainly more than "dockside rumor," *Zuckerbraun*, 935 F.2d at 548, but would nonetheless not prove that the Phalanx system was intended to destroy the Iraqi missile in these circumstances, much less to prove why it failed to do so. Plaintiffs have failed to demonstrate that this evidence is available to them as unclassified information. Accordingly, we conclude that dismissal was appropriate.

B.

Defendants also urge that dismissal was appropriate because the state secret privilege would deprive them of a valid defense. The contractors contend that "privileged state

secrets are essential to the defense to plaintiffs' claim," because "resort to classified information would be necessary even to cross-examine plaintiffs' witnesses on the most basic points of their testimony."

Most courts that have discussed the state secret privilege have adopted the position that, if privileged information would establish a valid defense, then the court ought to dismiss the plaintiffs' case. *Zuckerbraun*, 935 F.2d at 547; *In re United States*, 872 F.2d at 481; *Molerio v. F.B.I.*, 749 F.2d 815, 821 (D.C.Cir.1984); *Ellsberg v. Mitchell*, 709 F.2d 51,65 (D.C.Cir.1983). This circuit has not yet ruled on the effect of the state secret privilege on the availability of defenses and we decline to do so here where it is unnecessary to resolve the case before us.

C.

Even if we found that Bareford had made out a prima facie case with unprivileged information, we conclude that the state secret doctrine would nonetheless bar the plaintiffs' action because any further attempt by the plaintiffs to establish a prima facie case would threaten disclosure of important state secrets. *Farnsworth Cannon*, 635 F.2d *at 281; see also Bowles v. United States,* 950 F.2d 154, 156 (4th Cir. 1991) (holding case must be dismissed "where no amount of effort or care will safeguard the privileged information"). The state secret doctrine justifies dismissal when privileged material is central "to the very question upon which a decision must be rendered." *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985).

In *Fitzgerald*, for instance, the court affirmed the district court's dismissal, even though the plaintiff intended to produce only non-privileged information to support his

case. Fitzgerald was a former Navy contractor who had conducted experiments with dolphins in order to design torpedoes. Penthouse magazine published a story that, in part, alleged that Fitzgerald had distributed brochures describing the experiments to countries outside the United States and that these brochures contained classified information. The plaintiff brought a libel action against Penthouse, contending that the information in the brochures was not classified.

To prove falsity, the plaintiff intended to call an official from the Pentagon's Branch of Security Policy to testify that the information was not classified. The Navy, however, intervened to invoke the state secret privilege, stating that, although the official's testimony would ostensibly be about non-classified information, there was a considerable danger that classified information would leak during cross-examination. The district court dismissed the plaintiff's action, finding that "the very subject of this litigation is a state secret." 776 F.2d at 1243.

The *Fitzgerald* court referred at length to the Secretary of the Navy's affidavit in which the Secretary stated that, while some uses of the marine mammal program were not classified, others were highly classified. By calling experts to testify about non-classified uses, the court saw a danger that "state secrets could be compromised even without direct disclosure by a witness." *Fitzgerald*, 776 F.2d at 1243. For instance,

> if a witness is questions about facts A and B, the witness testifies that fact A is not a military secret, and the government objects to any answer regarding fact B, by implication one might assume that fact B is a military secret.

Id. at 1243 n. 10.

In *Farnsworth Cannon*, the plaintiffs alleged that a Navy Department employee, Grimes, had tortiously interfered with the plaintiffs' contractual relations with the Navy Department by cancelling the plaintiffs' contracts with the Department. The plaintiffs did not request discovery from the government and the subject of the litigation - the defendant's motivations in cancelling some Navy contracts - seemed remote from the content of the state secrets contained in the contracts themselves. Nevertheless, the en banc court vacated the original panel opinion and held that the case presented too great a risk of disclosure of state secrets to go to trial.

Fitzgerald and *Farnsworth Cannon* recognize the practical reality that in the course of litigation, classified and unclassified information cannot always be separated. In some cases, it is appropriate that the courts restrict the parties' access not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures. There is little question that the design and limitations of the Phalanx weapons system are matter "which reasonably could be seen as a threat to the military interests ... of the nation." *Halkin v. Helms*, 690 F.2d 977,990 (D.C.Cir.1982). As Judge Winters noted in *Zuckerbraun*, "the disclosure of secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation's warships may reasonably be viewed as inimical to national security." 935 F.2d at 547.

Plaintiffs would present the testimony of former Navy Captain Brindel, commanding officer on the Stark, and of

former General Dynamics employees. These witnesses have each had access to highly sensitive data. They would be questioned about their knowledge of the Phalanx's operation and defects. Perhaps some of this evidence is unclassified, as plaintiffs contend, or is contained in Congressional reports and other public sources. But the danger that witnesses might divulge some privileged material during cross-examination is great because the privileged and non-privileged material are inextricably linked. We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed.

The government maintains that, even if the data is available from non-secret sources, acknowledgement of this information by government officers would still be damaging to the government, because the acknowledgement would lend credibility to the unofficial data. *Fitzgibbon v. Central Intelligence Agency*, 911 F.2d 755, 765-66 (D.C.Cir.1990); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied*, 421 U.S. 908, 95 S.Ct. 1555, 43 L.Ed.2d 772(1975); and *Afshar v. Department of State*, 702 F.2d 1125, 1130 (D.C.Cir.1983). These cases stand for the proposition that disclosure of information by government officials can be prejudicial to government interests, even if the information has already been divulged from non-government sources. *Afshar*, 702 F.2d at 1130 ("Official acknowledgement by an authoritative source might well be new information that could cause damage to national security"). This contention has a troubling sweep, but we do not rest upon it, because we need not.

Plaintiffs argue that dismissal of their case was an overly harsh remedy for the potential security risk posed by the trial of this case. Dismissal is a harsh sanction. But the

results are harsh in either direction and the state secret doctrine finds the greater public good - ultimately the less harsh remedy - to be dismissal. Where "assertion of the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim, dismissal is appropriate." *Zuckerbraun*, 935 F.2d at 547. No intermediate solution such as those proposed by plaintiffs, as ably and creatively as their counsel has put it, can fully protect the United States' interest in keeping its state secrets undisclosed.

III.

The district court dismissed the claims on the alternative ground that they presented a non-justiciable political question outside the competence of the federal courts. We affirm on other grounds. We do not address this argument and express no opinion about its applicability.

IV.

Bareford raises two due process objections to the procedures of the district court. First, they argue that the district court should have provided a transcript of the proceedings that occurred during the *ex parte in camera* proceeding. Second, the plaintiffs argue that the district court should have given the plaintiffs more notice of the *ex parte, in camera* hearing.

Bareford's counsel was notified of the government's intent to produce more documents to the district court *in camera* on the same day that the court began its *in camera* review of these documents. Bareford contends that this does not constitute adequate notice for the plaintiffs to make a timely objection to the *in camera* proceeding. The government contends that this notice was sufficient to allow

the plaintiffs' counsel to raise objections to the *in camera* proceeding on the following day, when the district court conducted the hearing on the defendants' motion to dismiss. The government should have provided notice to allow the plaintiffs to object to the *in camera* proceeding before it occurred. *United States v. Hall*, 854 F.2d 1036, 1042 (7th Cir. 1988) (party should have notice of request for *in camera* review adequate to allow party to respond to request). This error does not require reversal, however, because Bareford's claim is dismissed without relying upon the materials produced by the government *in camera*. Any error was therefore harmless.

The district court did not provide a transcript of the *in camera* proceeding. This court cannot review a proceeding of which no record was made. *United States v. Southard*, 700 F.2d 1, 11-12 (1st Cir.), *cert. denied sub nom. Ferris v. United States*, 464 U.S. 823, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983) (district court should make transcript of *in camera* proceeding). For the reasons indicated above, however, any error in the *in camera* hearing was harmless.

V.

Plaintiffs challenge on First Amendment grounds the district court order to the parties not to communicate any information about the litigation to anyone except essential legal staff. This question is moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAWRENCE M. BAREFORD, et al.	)	**IN ADMIRALTY**
Plaintiffs,	)	**CIVIL ACTION**
v.	)	
GENERAL DYNAMICS CORPORATION, et al.	)	**NO. G-90-118(SBK)**
Defendants.	)	

OPINION

This is an action arising out of the Iraqi attack on the USS STARK on May 17, 1987. While cruising in the Persian Gulf, the USS STARK was hit by two Exocet anti-ship missiles fired by an Iraqi F-1 Mirage fighter; thirty-seven sailors were killed and several others were injured. The families and dependents of 23 crewmembers and two injured sailors brought suit to recover compensation from various military defense contractors based upon theories of negligence, breach of implied warranties of fitness, products liability, fraud and misrepresentation and deceptive trade practices. Each of these claims relate to the design, testing and manufacture of the radars and weapons systems aboard the USS STARK, and how the failure of these systems caused the deaths and injuries resulting from the Iraqi attack.

The United States intervened in the case and filed a motion to dismiss based on the grounds that the plaintiffs cannot prove a prima facie case without disclosing state secrets and that it is impossible to inquire into whether the

defense systems were defective or whether any defects caused the injuries without intruding into military operations and decisions which are political questions not subject to judicial review. The private defendants also filed motions to dismiss, based on the state secrets privilege, political question doctrine, espousal and the combatant exception to the Federal Tort Claims Act.

After reviewing all of the legal memoranda, including affidavits and exhibits attached thereto, presented by all the parties as well as classified documents reviewed by the court in camera, the court grants the motions to dismiss. For the reasons stated below, the complaint is dismissed on two independent grounds: the state secrets privilege and political question doctrine.[1]

At the request of the Government, this court takes judicial notice of the following facts:[2]

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1. The private defendants argued that the doctrine of espousal requires dismissal of this case. Espousal is the international law term for the practice by which a government undertakes to pursue on a diplomatic level the claims of its nationals against a foreign sovereign. *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981). Private defendants suggest that the decision by the United States to espouse the claims for the deaths and injuries of the sailors bars the instant lawsuit. The court does not find this argument persuasive.

Private defendants also argued that the combatant activity exceptions to the Federal Tort Claims Act, 28 U.S.C. § 2680 (j), should be extended to provide immunity to military defense contractors in cases arising out of the engagement of United States forces in combat. As the court has granted their motion to dismiss based on the state secrets privilege and political question doctrine, there is no need to address this novel issue.

2. In considering a motion to dismiss, the court may take judicial notice of certain facts. *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1388 (9th Cir. 1987), *cert. denied.* ___U.S.___, 108 S. Ct.

The war between Iran and Iraq, which began in 1980, has resulted in over 450 air attacks on Persian Gulf shipping from 1984 to 1987, with an increasing number of attacks on ships trading with Kuwait. In 1986 Kuwait sought protection from Iranian attack on their shipping from the United States, Soviet Union, Great Britain, France and China. A major objective of the national security policy of the United States in 1987 was ensuring the continued access by the Free World to the oil supplies in the Persian Gulf. In 1987, the United States agreed to reflag Kuwaiti ships under U.S. registry and provide naval protection for such ships. The United States maintains a continuing naval presence in the Persian Gulf to escort American flag ships and certain ships especially reflagged as American and to respond to attacks on American flag and other neutral ships. After the aerial attack on the USS STARK by an Iraq warplane on May 17, 1987, the Government of Iraq, pursuant to an international agreement, provided $27,350,374.00 in compensation to the United States for claims arising out of the deaths of 37 individuals, including plaintiffs' decedents. Iraq transferred this amount to the United States, which in turn, distributed the checks to the individual beneficiaries of this claims settlement.[3] In response to Iraq's invasion of Kuwait, the United States has deployed additional naval forces to the Persian Gulf and since January 1991 has been at war with the Government of Iraq.

2031 (1988). See Rule 201, *Fed. R. Evid.* There has been no objection by plaintiffs to the Government's request to take judicial notice of these facts.

3. After the STARK tragedy, Iraq also agreed to provide compensation for the damages suffered by the injured sailors and the ship. Although the wrongful death claims have been paid, the personal injury and property damage claims have not.

DISCUSSION

In considering a motion to dismiss, the court must assume that all facts alleged in the complaint are true. The court may grant the motion, however, if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

1. *State Secrets Privilege*

The privilege of refusing to reveal military or diplomatic secrets is well-established and dates back to Aaron Burr's trial for treason. *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390 (S.D.N.Y. 1982), citing *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14, 692d). In *Totten v. United States*, The Supreme Court stated that a case must be dismissed when the subject matter of the litigation should be treated as confidential. 92 U.S. 105 (1875) (Plaintiff contracted with President Lincoln to act as a secret agent during the Civil War and later sued to secure payment.)

In *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court established the requirements and scope of the state secrets privilege. The Court held that the privilege belonged to the federal government and may only be asserted by it. In order to invoke the privilege, the head of the department which has control over the subject matter must file a formal claim of privilege after personal consideration of the classified information at issue.

In assessing the government's assertion of the privilege, the court should accord "the utmost deference to executive assertions of the privilege." *National Lawyers Guild*, 96 F.R.D. at 398, citing *Halkin v. Helms*, [*Halkin I*],

598 F.2d 1, 9 (D.C. Cir. 1978), citing *United States v. Nixon*, 418 U.S. 683, 710 (1974); however, the court should not abdicate judicial control of the evidence in the case to the executive. *Reynolds*, 345 U.S. at 9. Once the court determines that disclosure of the information necessary to prosecute the case would pose a reasonable danger to national security, then the needs or interest of the litigants in desiring to make the information public are set aside and the case must be dismissed. *Reynolds*, 345 U.S. at 11; *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399, 402 (D.C. Cir 1984); *Halkin v. Helms*, [*Halkin II*], 690 F.2d 977, 990-91 (D.C. Cir. 1982).

Where prosecution of the claim would require the disclosure of information protected by the state secrets privilege, dismissal of the action is warranted. *Totten*, *supra*; *Farnsworth Cannon v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc); *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Halkin II*, *supra*; *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989); *Bailey v. Varian Associates*, CA No. 89 2338 (N.D. Cal. June 11, 1990) (appeal pending). Similarly, if classified military information is "so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privilege," the case must be dismissed in its entirety. *Fitzgerald*, 776 F.2d at 1241-42; *Farnsworth*, *supra*; *Zuckerbraun v. General Dynamics, et. al*, 1990 U.S. Dist. LEXIS 18218, (D. Conn. 1990) (appeal pending); *Nejad*, *supra*; *Bailey*, *supra*.

It is well-established that the state secrets privilege may be invoked to protect against disclosure of classified or sensitive information relating to the country's national defense. *Reynolds*, 345 U.S. at 10; *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983); *Northrop*, 751 F.2d at 399. A country's national security system is the "most confidential

information a country can possess." *Northrop*, 751 F.2d at 402. The privilege has been upheld in cases to prevent the disclosure of technical information concerning weapons systems aboard naval ships as well as the rules of engagement (ROE). *Zuckerbraun*, *supra*; *Nejad*, *supra*; *Bailey*, *supra*.

Both *Nejad* and *Bailey* arose out of the 1988 incident in which Iran Flight 655 was shot down by missile fire from the USS VINCENNES. Similar claims for negligence, products liability and breach of warranties of fitness were filed against the defense contractors. In *Nejad* and *Bailey*, the courts found that the cases could not be adjudicated without revealing military secrets relating to the weapon's technology, the disclosure of which would be harmful to national security.

In *Zuckerbraun*, a substantially identical products liability case arising out of the May 17, 1987 Iraqi attack on the USS STARK was filed. Motions to dismiss were filed on the same grounds alleged in the instant case and Secretary Garrett filed an affidavit identical to the one filed herein. The court granted the motions, holding that plaintiff could not present a prima facie case without revealing state secrets and the case presented nonjusticiable issues under the political question doctrine.

In the present case, all the requirements set forth in *Reynolds* for asserting the state secrets privilege have been satisfied. The Secretary of the Navy, H. Lawrence Garrett, III, has presented the court with his affidavit, asserting a formal claim of privilege after personal consideration of the information which would have to be disclosed during preparation for and trial of this case. He has further described the effect on national security such disclosures would have. Secretary Garrett determined that the technical

capabilities and other details concerning the weapons systems which allegedly failed and the ROE under which the USS STARK operated during the attack cannot be disclosed without risking serious damage to our nations's security. Secretary Garrett stated further that the material deficiency reports addressing performance or technical deficiencies as well as reports addressing uncorrected deficiencies, whether known at the time the weapons were delivered to the Navy or later detected in the course of their operation, are themselves classified.

The Secretary's declaration sets forth in detail the significance of the Phalanx and other defensive systems aboard the STARK to the national security of the United States. The declaration further described the sensitive nature of the capabilities and limitations of radars and weapons systems installed on naval ships or other platforms and the threat to national security resulting from revelation of this material, which would be essential to prove or disprove plaintiffs' claims. Disclosure of technology relating to our defense systems would permit foreign powers to exploit weaknesses and adopt counter-measures. This is particularly harmful because the systems at issue represent significant advancements in technology and the ships equipped with such weapons are expected to be present into the twenty-first century. Although Secretary Garrett's declaration was prepared several months before the war with Iraq began, his statements take on more significance in light of the present conflict.

The Secretary further concluded that

> [d]isclosure of the rules of engagement under which USS STARK operated would enable potential adversaries to predict more accurately the rules governing U.S. Navy ships in high threat

> environments. With such knowledge, an adversary could take action against an American vessel with greater assurance that an American response was prohibited, or could graduate its provocation, and time the massing of its forces, in a way calculated to disable the United States.

Affidavit at 12-13.

Plaintiffs have challenged the Secretary's affidavit with affidavits of James H. Webb, Jr., former Secretary of the Navy at the time of the STARK incident, Glenn R., Brindel, former commanding officer of the USS STARK in May 1987 and Thomas S. Amlie, an assistant for technical systems in the office of the Assistant Secretary of the Air Force. Messrs. Webb, Brindel and Amlie suggest that the classified information, which Secretary Garrett stated would be implicated in this case, should not be classified or that declassification would not impact national security. The current Secretary is the official responsible for exercising judgment as to what information should remain classified for reasons of national security. The declarants relied upon by plaintiffs are not in a position to know of the United States' present need for secrecy. It has been almost three years since Mr. Webb was Secretary, and unlike Secretary Garrett, Mr. Webb no longer has access to or control over the state secrets which are subject to the privilege in this case.

> There is a practical reason for avoiding judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.

United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). The declarants do not have the data available to Secretary Garrett to make an informed judgment as to what types of information should be classified in the interest of national security.

Mr. Webb admits that classified information would be implicated in this case, but he believes it should be declassified due to the nature of plaintiffs' claims. Once the privilege has been properly invoked, however, it is absolute. There is no balancing of the interest of private litigants against the secrets of state. *Ellsberg*, 709 F.2d at 57; *Reynolds*, *supra*. The "balance has already been struck" in favor of protecting state secrets over the interest of private litigants. *Halkin II*, 690 F.2d at 990; *In Re United States*, 872 F.2d at 476.

Plaintiffs also challenge the classification of the information because they claim much of it is in the public domain. In support of their argument, they have provided the court with eleven congressional reports or letters, twenty-two media articles and five declarations. The state secrets privilege is not waived unless the information is disclosed by a public official in a position and with the authority to disclose it. *Knopf v. Colby*, 509 F.2d 136 (4th Cir. 1975, *cert. denied*, 421 U.S. 992, *reh'g denied*, 422 U.S.1045 (1975); *Fitzgibbon v. CIA*, 911 F2d 755 (D.C. Cir. 1990). Publication of newspaper articles and congressional committee reports which may contain classified information does not alter the fact that the information is classified and may not be officially acknowledged. *Fitzgibbon*, 911 F.2d at 765-66. See *Marchetti*, *supra*. Moreover, official acknowledgement of a fact which has already been the subject of widespread media attention can in and of itself damage national security. *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983); *Fitzgibbon*, 911 F.2d at

766. In the areas of intelligence and national security, there is a significant difference between official and unofficial disclosure of information.

An in camera review of classified documents is unnecessary when the court is satisfied "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. Based on the briefs and exhibits presented from both sides, this court agrees with the holding in *Zuckerbraun* that "it is apparent from all the circumstances involved that there is a reasonable danger that disclosure of the information in question would pose a threat to national security." 1990 U.S. Dist. LEXIS 18218, at 14-15.

Although not required, this court accepted the offer of the United States to present certain documents for an in camera review.[4] The court was satisfied before the in

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4. Plaintiffs objected to the in camera review on the grounds of lack of due process, not being present at the production and not having an opportunity to review the classified materials. Private counsel have no right to be present at an in camera production of documents which are the subject of a sate secrets privilege. *Ellsberg*, *supra*; *Halkin I*, *supra*; *Jabara v. Kelley*, 75 F.R.D. 475, 486-487 and n. 37 (E.D. Mich. 1977).

When the normal rights of a private litigant are inconsistent with the need for an in camera production of documents, the rights of the litigant must take a back seat to that of the sovereign in protecting its state secrets. *Jabara*, 75 F.R.D. at 486-487. "The rationale for this rule is that our nations's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." *Ellsberg*, 709 F.2d at 61.

The documents reviewed included the unabridged Navy Report

camera review that there was a reasonable danger that disclosure of information relevant to this lawsuit would threaten national security. After reviewing the classified materials, it is absolutely clear that the state secrets privilege has been invoked properly and that the statements made in Secretary Garrett's declaration are correct.

Once the court finds that the privilege has been invoked properly, it is necessary to determine whether and to what extent the court may proceed with this case. In doing so, the court should consider the ability of the plaintiffs to be able to prove their claims without disclosing state secrets. Although in deciding how far to probe the assertion of the privilege, the court must consider the parties' need for proof, the balance is not evenly struck; i.e., "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11, citing *Totten*, *supra*. (action dismissed on the pleadings). Faced with the same dilemma, the *Zuckerbraun* court concluded:

> In order to prove his allegations that the defendants negligently and defectively designed, manufactured, and tested the weapons systems, that the weapons were not fit for their intended purpose, and that General Dynamics negligently tested the weapons and intentionally misrepresented the test results, the plaintiff would have to conduct an examination of the capabilities and limitations of the defensive systems installed on the USS STARK. According to the

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of Investigation without exhibits, an affidavit of Vice Admiral Kihune, Assistant Chief of Naval Operations (Surface Warfare) and a memorandum of the United States addressing the substance of these two documents. All of the materials presented to the court for its in camera review were classified "secret".

> Secretary, the capabilities and limitations of these weapons systems are classified state secrets which may not be revealed. Furthermore, as defendants argue, in order to establish that the weapons system caused the harm, an inquiry into the conduct of the crew of the USS STARK would be necessary. This inquiry would have to include an examination of the applicable rules of engagement, the orders issued by the naval chain of command, and whether those orders were properly carried out. Again, the Secretary has asserted that the rules of engagement are classified state secrets which may not be revealed.

1990 U.S. Dist. LEXIS 18218, at 16-17.

Among the elements of a product liability claim are proof of a defective product and that the defect proximately caused the injury. In this case, this court is satisfied that neither of these elements could be proven without release of classified information. "This is one of those situations where 'the very question upon which the case turns is itself a state secret.'" *Zuckerbraun*, 1990 U.S.Dist. LEXIS 18218, at 16, citing *Fitzgerald*, 776 F.2d at 1239, n. 3.

While this court acknowledges that it is an extraordinary measure to dismiss a lawsuit at the outset without giving the plaintiffs an opportunity to conduct discovery, it is a decision which is supported by precedent and the circumstances of this case. Numerous courts have dismissed cases where prosecution of the claims would result in unwanted disclosures. *Zuckerbraun*, *supra*; *Farnsworth*, *supra*; *Totten*, *supra*; *Fitzgerald*, *supra*; *Halkin II*, *supra*; *Nejad*, *supra*; *Bailey*, *supra*; *Guong v. United States*, 860 F.2d 1063 (Fed Cir. 1988).

Proof of plaintiffs' theories would require them to

conduct an examination of the design requirements for multiple defensive systems. To prove the allegations in their complaint, they would have to delve into the specifications and capabilities of the radars and other defense systems, the crucial details of which are classified. The type of information classified in each of the several defense systems are discussed in the Secretary's declaration. The details essential to plaintiffs' claims are classified.

Further, to prove that the alleged defective products were the proximate cause of the ship's failure to successfully defend herself against the attack, the ROE would have to be examined to ascertain the applicable orders when the STARK is aware of an approaching aircraft and to what extent those orders were followed. The applicable ROE contained in the Navy Report of Investigation are classified.

Plaintiffs have made a valiant effort at showing they could prove a prima facie case without classified information by presenting the court with several declarations and numerous exhibits. However, even if they attempted to avoid requests for classified information, which is unlikely, this court is absolutely convinced that there is a substantial risk such information would be released inadvertently or directly by a process of elimination. The Fourth Circuit, en banc, considered this possibility and held:

> In an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing. It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state

> secrets precludes any further attempt to pursue this litigation.

Farnsworth, 635 F.2d at 281.

Attempts by plaintiffs to present a prima facie case would inevitably disclose classified information, which would be detrimental to our nation's security and to the men and women fighting in the Persian Gulf. The potential witnesses in this case, such as the ones who have prepared affidavits for plaintiffs, have had access to classified information and are prohibited from disclosing that information. For some of them, it has been several years since they have had access and a need to know that information. Over time, memories fade as to the distinction between what is and is not classified. There is an obvious risk that they may inadvertently reveal details which are classified and should not be disclosed. When former employees, such as Messrs. Brindel and Webb, rely on their own judgments as to what information is detrimental, they may reveal facts which the Navy, with its broader understanding of what may reveal classified information, would consider harmful. See *Snepp v. United States*, 444 U.S. 507 (1980).

Even if plaintiffs could present a prima facie case without disclosing classified information, defendants would need to use classified material to cross-examine witnesses and present their defense. If this classified information could establish a defense to the claim, dismissal would be appropriate. *In Re United States*, 872 F.2d at 476. See *Molerio v. F.B.I.*, 749 F.2d 815, 825 (D.C. Cir. 1984).

Plaintiffs suggest that access to the classified information can be limited to counsel or that the case could be tried in camera or before the bench. These suggestions are unworkable when the case, such as the instant one,

encompasses so much classified information. When the very subject matter of the case is classified or the issues raised are permeated with secret information, the case cannot proceed. The Secretary's invocation of the state secrets privilege was proper and this court finds that plaintiffs cannot prove their case without revealing classified information; therefore, the case must be dismissed.

2. *Political Question Doctrine*

A second independent basis for dismissal is the political question doctrine. Suits raising "political questions" are nonjusticiable, and therefore, not "cases or controversies" within the meaning of Article III of the Constitution. *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo*, 577 F.2d 1196, 1203 (5th Cir. 1978, *cert. denied*, 442 U.S. 928 (1979).

In *Baker v. Carr*, the Supreme Court identified six characteristics of nonjusticiable issues:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). The appearance of any one of these factors compels dismissal of the matter as a nonjusticiable political question. *Id.* See also *Occidental*, *supra*.

The United States and the private defendants argue that the conduct of foreign policy and military operations are committed to the Executive Branch and that there is a lack of judicially manageable standards for resolving this case due to the military nature of the incident. The conduct of military operations and foreign policy are committed by the Constitution to the Executive Branch of government. Article II, §2, vests the President with exclusive authority over the armed forces of the United States as Commander-in-Chief, and over the conduct of foreign affairs. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), inasmuch as they are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 242 U.S. 580, 589 (1952).

In *Gilligan v. Morgan*, the Supreme Court explained the reasons why courts traditionally avoid second-guessing military decisions:

> It would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military

> judgments, subject *always* to civilian control of the Legislative and Executive Branches.

413 U.S. 1. 10 (1973). The "composition, training, equipping, and control" of the United States naval forces in the Persian Gulf, and specifically the USS STARK, are precisely the decisions which this court would have to scrutinize in adjudicating plaintiffs' claims. It appears unavoidable that the STARK incident will implicate "military decisions which are committed to the executive branch and for which the court lacks judicially manageable standards." *Zuckerbraun*, 1990 U.S. Dist. LEXIS 18218, at 23.

Even if plaintiffs were able to prove without classified information that the weapons aboard the STARK were defective, the court must still determine whether the defective equipment caused the sailors to unsuccessfully defend against the attack. In determining this causation issue, the court would have to consider the readiness and state of alert of the crew; training of the crew with respect to identification of hostile aircraft and the operation of defense systems, including how and when they are to be used; whether it would have been reasonable for the crew to classify the Iraqi aircraft as hostile; what a reasonable response would have been; the actual capabilities of the crew to respond to the Iraqi fighter with and without defective equipment and whether such action would have been successful, given the capabilities of the weapons systems and the men handling them.

Even assuming that this information could be presented without revealing classified information, this court would have to render decisions that would implicate military tactical operations. Defendants have indicated that their defense would attempt to show that the naval crew should have initiated a preemptory strike against the Iraqi fighter;

the applicable ROE were inappropriate for the circumstances; and that military orders were not carried out or that the tactical decisions of the crew were flawed. There are few "area[s] of governmental activity in which the courts have less competence" to act than in the area of military decision-making. *Gilligan*, 413 U.S. at 10; *Owens v. Brown*, 455 F. Supp. 291, 299 (D.D.C. 1978). This case provides this court with a myriad of issues for which it is not equipped to create manageable standards. This court lacks the "standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life." *Rappenhacker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980); *Zuckerbraun*, *supra*.

Plaintiffs argue that the political question doctrine has no application to cases alleging product liability claims against military defense contractors. The basis for plaintiffs' argument is that the government contractor defense, explained by the Supreme Court in *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988), provides the only standard by which the court may determine whether plaintiffs may prevail in their action. Plaintiffs confuse the threshold jurisdictional inquiry required under the political question doctrine with an affirmative defense which may be pleaded by defendants.

The political question doctrine is based upon the constitutional principle that the Judiciary may not interfere with military and foreign policy matters committed to the Executive. The government contractor defense, however, is rooted in the concept of sovereign immunity. *Boyle*, 108 S. Ct. at 2513. Under *Boyle*, there is no liability for design defects in military equipment if the United States approved and the product conformed to the specifications and the contractor warned the United States about dangers in the use of the product known to the contractor and unknown to the

government.

There is nothing in the *Boyle* decision to suggest that it supplants the political question doctrine in cases raising products liability claims against defense contractors. Plaintiffs have not cited any cases where a court, in examining the political question doctrine, abandoned the *Baker v. Carr* analysis in favor of the government contractor defense.[5] There are, however, at least three cases which have applied the political question doctrine to product liability claims against military contractors. *Zuckerbraun*, *supra*; *Nejad*, *supra*; *Bailey*, *supra*. The court finds that at least the first two characteristics of *Baker v. Carr* are present in this case, and therefore, must dismiss the complaint.[6]

February 25, 1991 /s/ Samuel B. Kent
DATED UNITED STATES DISTRICT JUDGE

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5. The cases cited by plaintiffs involve defective military equipment; however, none of them raised political questions.

6. Defendants also contend that the United States' demand for compensation under international law from the Government of Iraq would be undermined if this suit was allowed to proceed. They also argue that inconsistent "official" opinions on liability for the STARK incident would undermine current foreign policy positions. As the court finds the first two characteristics of *Baker v. Carr* applicable, these additional contentions do not require discussion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAWRENCE M. BAREFORD, et al., Plaintiffs	§	
VS.	§	**CIVIL ACTION NO. G-90-118**
GENERAL DYNAMICS CORPORATION, et al., Defendants.	§	

FINAL JUDGMENT

Still pending before the Court are Plaintiffs' Motion to Abate. Plaintiffs' Motion to Apply Other Options, and Plaintiffs' Motion for *In Camera* Deposition. By this Order, the above Motions are DENIED.

Further, and in accordance with this Court's "Opinion" filed on February 25, 1991, this case is DISMISSED in its entirety, pursuant to Fed. R. Civ. Pro. 12(b)(6).

This is a FINAL JUDGMENT.

SIGNED at Galveston, Texas, this 10th day of April, 1991.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent text of constitutional provisions involved is set out below.

U.S. Const., amend. I: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

U.S. Const. art. IV, § 2: "The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several states."

U.S. Const., amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const., art. III, § 2: "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . under their Authority;. . .

"--to Controversies . . .

"--between Citizens of different States . . ."

U.S. Const., art. II, § 2: "The President shall be Commander in Chief of the Army and Navy of the United States . . . [and] He shall have Power . . . to make Treaties . . ."

SUITS AGAINST THE UNITED STATES
Effect Of Assertion Of State Secrets Privilege

United States Supreme Court

United States v. Reynolds, 345 U.S. 1(1953).
Remand case for litigation without privileged information.

Second Circuit

Clift v. United States, 597 F.2d 826 (2d Cir. 1979).
Remand case for consideration of "appropriate stay" until national security threat no longer exists.

Halpern v. United States, 258 F.2d 36(2d Cir. 1958).
Remand case for consideration of *in camera* trial.

National Lawyers Guild v. Attorney General, 96 F.R.D. 390 (S.D.N.Y. 1982).
Formal claim of privilege must be made for every item sought to be privileged on an item-by-item determination.

Spock v. United States, 464 F. Supp. 510 (S.D.N.Y. 1978).
Denial of government's motion to dismiss and schedule conference to consider procedures to safeguard state secrets.

Fourth Circuit

Bowles v. United States, 947 F.2d 91 (4th Cir. 1991).
Dismissal affirmed against government, but plaintiff could pursue case against private parties.

Siglar v. LeVan, 485 F. Supp. 185 (D. Md. 1980).
Dismissal granted as to estate's claims, but dismissal denied as to widow and daughter's individual claims.

Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980) (en banc per curiam).
(Grimes employed by Navy.) Dismissal affirmed.

Heine v. Raus, 399 F.2d 785 (4th Cir. 1968), *cert. denied*, 402 U.S. 914 (1971).
(Raus was paid undercover agent of CIA.) Summary judgment vacated to allow plaintiff to show defendant's libel was not authorized by CIA.

Fifth Circuit

Bentley v. United States, 16 F.R.D. 237 (M.D. Ga. 1954).
Investigation report not privileged; production required.

Sixth Circuit

Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977).
Requires *in camera* inspection of documents because of "compelling need" and government must provide limited answers to interrogatories.

Ninth Circuit

Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989).
Case against government and private parties dismissed.

District of Columbia Circuit

In re United States, 872 F.2d 472 (D.C.Cir. 1989), *cert. dism'd sub nom. United States v. Albertson*, 493 U.S. 960 (1989).
Mandamus to grant motion to dismiss denied. District court can police the litigation so as not to compromise national security, with item-by-item determination and other controls.

Molerio v. FBI, 749 F.2d 815 (D.C.Cir. 1984).
Dismissal affirmed on basis of *in camera* affidavit.

Ellsberg v. Mitchell, 709 F.2d 51 (D.C.Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984).
Reversed dismissal; provides instructions to district court on how to resolve.

Salisbury v. United States, 690 F.2d 966 (D.C.Cir. 1982).

Dismissal affirmed.

Attorney General v. The Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983).

Declines to dismiss although defendant needed privileged documents in aid of its defense.

Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982) ("Halkin II").

Dismissal affirmed on basis of lack of standing and mootness.

Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) ("Halkin I").

Affirmed dismissal with respect to certain claims; remanded for consideration of other claims.

United States v. Felt, 502 F. Supp. 74 (D.D.C. 1980).

Approves question-by-question objection procedure.

SUITS AGAINST PRIVATE PARTIES
Effect Of Assertion Of State Secrets Privilege

Second Circuit

Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991).

(Government intervened to assert privilege.) Dismissal affirmed.

Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130 (2d Cir. 1977).

(Government asserted privilege in response to production request.) Affirmed district court's denial of jury trial and reference of the case to a magistrate to protect secrecy.

N.S.N. International Industry v. E.I. DuPont de Nemours & Co., 140 F.R.D. 275 (S.D.N.Y. 1991).

(Government asserted privilege in response to production request.) Plaintiff allowed to proceed with "substantial evidence from other sources" but without privileged information.

Fourth Circuit

In re Under Seal, 945 F.2d 1285 (4th Cir. 1991).

(Government asserted privilege in response to production request.) District court ordered depositions conducted in secure facility with objections by government security officials. After depositions, plaintiff conceded that he

could not proceed to trial without privileged information. Summary judgment affirmed.

Fitgerald v. Penthouse International, Ltd., 776 F.2d 1236 (4th Cir. 1985).

(Government intervened to assert privilege.) Dismissal affirmed.

District of Columbia Circuit

Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395 (D.C. Cir. 1984).

Defendant can proceed with litigation without privileged information under proper controls.